posted to SBC's billing systems. See AT&T Comments at 64-66; AT&T's DeYoung/Willard Decl. ¶ 63. This is false. SBC's systems treat the end-user account as effectively migrated to the new local service provider once provisioning is complete and a service completion order ("SOC") notice has been sent to the CLEC, not when the order posts to the billing systems. See Brown/Cottrell/Lawson Reply Aff. ¶ 91. And, in most cases, the customer service information ("CSI") for the end user will be updated in the ACIS database within 24 hours of delivery of the SOC to reflect the CLEC as the "owner" of the account. See id. Once the CSI has been updated in ACIS, SBC Midwest's systems are programmed not to reject a CLEC change order even if the billing system has not been updated. See id. ¶ 92.

Moreover, even where the CSI is not yet updated, SBC's systems are programmed to determine if it might be soon – i.e., to perform a "pending order" check to see if a FOC has been sent to the CLEC. See id. ¶ 93. If so, SBC's systems and processes are designed to process the CLEC's subsequent change even if the CSI has not yet been updated in ACIS. See id. The upshot is that the crux of AT&T's allegation – that purported delays in receiving PTBs prevent it from submitting change orders – is simply wrong. In most cases, AT&T can begin sending change orders on UNE-P migrations once it receives a FOC from SBC Midwest. See id.

AT&T also asserts that it relies on PTBs to determine when to start billing end users, such that any delays in receiving those notices adversely affects it relationship with its end users. See AT&T Comments at 65-66; AT&T's DeYoung/Willard Decl. ¶ 62. But, while AT&T is free to use any information it wants to determine when to bill its own customers, the fact of the matter is that PTBs are not designed for that purpose. Rather, they are intended to indicate that the SBC Midwest billing database has been updated based on a given LSR. See

Brown/Cottrell/Lawson Reply Aff. ¶ 94. In fact, PTBs were not even available to AT&T until it migrated to LSOR 5.03 in December 2002. See id. The notion that it therefore "needs" such notices in order to bill its own customers is therefore implausible.

In all events, apart from AT&T's misunderstanding of the purpose and effect of PTBs, the factual predicate for its argument – that SBC Midwest is slow in providing these notices, see AT&T's DeYoung/Tavares Decl. ¶ 20 – is incorrect. SBC Midwest has provided data to the CLECs that show that SBC typically provides PTBs within five days of the service order (which is precisely the standard that AT&T thinks should be adopted). See Brown/Cottrell/Lawson Reply Aff. ¶ 88. What is more, AT&T's allegation of "substantial competitive harm" stemming from the allegedly untimely PTBs is vastly overblown. AT&T's DeYoung/Willard Decl. ¶ 72. As noted, the theory behind this alleged harm is that AT&T must wait to send a change order until it receives a PTB, lest it receive a reject. The data, however, make clear that, from May through July in the Midwest region, AT&T received such rejects on 0.03%, 0.05%, and 0.02%, respectively, of its LSRs. See Brown/Cottrell/Lawson Reply Aff. ¶ 100. AT&T fails to explain how numbers such as these – even assuming them to be the fault of SBC Midwest – can plausibly be said to result in "substantial competitive harm." See New Jersey Order ¶ 116 (declining to give weight to allegations of late billing completion notices, where the "absolute number of orders affected" was "not . . . competitively significant").

B. Ordering

The DOJ notes that "[s]ome CLECs argue that they are often forced to rely on manual processes" to order services and UNEs from SBC Midwest. DOJ Eval. at 15. In particular, the Department notes that, when electronic orders are erroneously rejected, "CLECs must bypass

SBC's interfaces and submit affected orders manually by fax." Id. And, based on "[t]he nature and number of the software problems alleged," the DOJ concludes that "SBC's software testing may be inadequate." Id.

SBC Midwest's software testing is not, in fact, inadequate, and the CLECs' self-serving allegations are not to the contrary. Thus, for example, CIMCO, one of the CLECs on which the DOJ relies, complains that it identified "various deficiencies" during its pre-testing phase prior to the implementation of LSOG 5, and that SBC "chose to withhold any corrections" before CIMCO went into production. CIMCO Comments at 2. LSOG was available in the test environment as of January 7, 2003. Brown/Cottrell/Lawson Reply Aff. ¶ 32. CIMCO waited until May to begin testing, however, and the issues it identified were simply too late to be included by the time it was required to migrate. Even so, SBC Midwest addressed CIMCO's issues as soon as reasonably possible upon learning of its difficulties. See id. ¶ 36. Far from demonstrating "inadequate" testing, this example demonstrates the lengths to which SBC Midwest will go to work with the CLECs to resolve outstanding issues.[21]

Nor is it the case that CLECs in the SBC Midwest are encountering unacceptably high levels of rejects. Access One – another CLEC on which the DOJ relies in this context – alleges

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[21] Indeed, the only testing allegation that is remotely substantiated is provided by a party (TDS Metrocom) on which the DOJ does *not* rely in this context. See Brown/Cottrell/Lawson Reply Aff. ¶ 31 (explaining two isolated instances in which orders were improperly accepted in the testing environment due to error by a single LSC service representative, and noting further that SBC has reinforced with this service representative the importance of mirroring the production environment when engaged in CLEC testing). That allegation, of course, is insufficient on its face to demonstrate that SBC Midwest's testing environment is insufficient. See California Order ¶ 98 ("We also reject AT&T's argument that, because AT&T was unable to identify two types of problems during testing that arose later when it began submitting real orders . . . , Pacific Bell's test environment is flawed.").

that SBC Midwest has rejected 70% of "simple electronic orders" and suggests that SBC Midwest is to blame. See Access One Comments at 3. Access One does indeed experience a high rate of rejection – far higher than the corresponding average CLEC reject rate – but that is due to its own difficulties filling out and submitting LSRs on simple orders. See Brown/Cottrell/Lawson Reply Aff. ¶ 59 & Attach J. And, as the Commission has said previously, variations in CLECs' ability to successfully submit orders electronically says more about variations in the CLECs themselves; it does not reflect any inadequacy in the BOC's systems. E.g., Georgia/Louisiana Order ¶ 145 (noting that "BellSouth's ability to flow-through orders at high rates is dependent, in part, on the ability of competing carriers" to submit orders properly); see also Brown/Cottrell/Lawson Reply Aff. ¶¶ 121-127 (discussing CIMCO's difficulties ordering complex products correctly).

C. Line Loss Notifications

In connection with the Michigan proceeding, a number of commenters raised allegations regarding line-loss notifications ("LLNs"). Michigan Bell responded to those allegations comprehensively, acknowledging that it had experienced some difficulties in the past but demonstrating that it had fully addressed them. See Brown/Cottrell/Lawson Reply Aff. ¶ 146 (identifying testimony addressing LLN allegations). On the basis of that showing, the DOJ, which initially raised concerns relating to LLN, ultimately concluded that SBC Midwest's line loss issues "appear to have been resolved." Evaluation of the Department of Justice at 3-4, WC Docket No. 03-138 (FCC filed July 16, 2003); see also, e.g., ICC Comments at 64 ("[Illinois Bell's] line loss notification procedures comply with section 271 requirements.").

Undeterred, MCI broadly alleges that SBC Midwest is "again having problems both with erroneous line loss notifications being sent and with its processes for alerting CLECs to its line loss errors." MCI's Lichtenberg Decl. ¶ 17. To support this sweeping allegation, however, MCI can identify only a single instance that was not fully addressed in the Michigan proceeding. Specifically, MCI relies on an isolated incident that occurred on June 3, 2003, that resulted in 414 erroneous LLNs sent to MCI. See id. Three facts are important to keep in mind regarding this issue. First, although the incident involved 414 erroneous LLNs, its actual impact on MCI was far less, since 398 of those LLNs corresponded to lines that MCI did not serve. See Brown/Cottrell/Lawson Reply Aff. ¶ 147 & Attach. L. Second, these erroneous LLNs were the result of a single, isolated error by a single employee, and accordingly does not reflect a systemic problem. See id. ¶ 148. Third, SBC Midwest reported the incident itself promptly upon discovery, and it has taken remedial steps to limit the likelihood that manual error of the sort at issue here will recur. See id. ¶¶ 150-152. All told, this incident hardly supports the proposition that SBC fails to provide nondiscriminatory access to OSS. See Georgia/Louisiana Order ¶ 163 (declining to credit line-loss allegations where they did not suggest "systemic" problems and were not of sufficient "scope and duration" to raise serious competitive concerns).[22]

D. Change Management

SBC Midwest satisfies all aspects of this Commission's test for an adequate change management process ("CMP"). See Cottrell/Lawson Aff. ¶¶ 144-211. Indeed, the Commission has already reviewed and approved this process repeatedly, in connection with SBC's

[22] SBC Midwest's recent notification to AT&T regarding 29 incorrect LLNs during the period from June 20 to August 15 likewise involves an isolated occurrence that SBC has taken steps to ensure will not recur. See Brown/Cottrell/Lawson Reply Aff. ¶¶ 154-155.

applications for interLATA relief in California, Arkansas, and Missouri. See id. ¶ 145. CLECs nevertheless challenge this same CMP here on a number of grounds, none of which has merit.

First, Choice One complains that SBC did not accept its proposed change request to implement "unreject" functionality. See ACN et al. Comments at 24; see also Forte Comments at 7-9. Specifically, under LSOG 4, where the CLEC received an erroneous electronic reject on an electronically submitted order, the LSC could "unreject" the order upon notification by the CLEC. See Brown/Cottrell/Lawson Reply Aff. ¶ 10 & n.24. Such "unreject" functionality is not part of the Uniform & Enhanced Plan of Record, and it accordingly is not available in the Midwest region with LSOG 5 and higher.

Although Choice One seeks to paint SBC's handling of this change as a failure of the CMP, the exact opposite is true. In June of 2002, Choice One submitted its change request to restore the "unreject" functionality for the Midwest, and to implement it for the first time for the West and Southwest regions. See id. ¶ 12. As documented by the CMP history log for this request, SBC did not "immediately dismiss" Choice One's change request as Choice One alleges, but rather gave it full consideration. See id. ¶¶ 12-15. Choice One's change request was actively discussed in CMP meetings in February, March, May, and June 2003. See id. ¶ 13. Although the change request was finally denied – for reasons primarily relating to the costs and difficulty of reprogramming the systems, and SBC's determination that resources were better devoted to clearing the defects giving rise to the rejects rather than expending resources on reprogramming to allow processing despite the rejects – that decision was made only after full consideration and discussions with CLECs in CMP meetings.[23] This episode thus demonstrates SBC Midwest's adherence to its CMP, not – as Choice One alleges – a flaw in it.

Second, Choice One and MCI complain that the number of defects is increasing with successive LSOG releases, and that the speed with which those defects are repaired has not improved. ACN et al. Comments at 25; MCI Comments at 10. Choice One's and MCI's complaint is based on a mischaracterization of the enhanced defect report ("EDR"). Both Choice One and MCI argue that the number of defects listed on the EDR have increased, but neglect to mention that, unlike the earlier version of the Defect Report – which only listed defects reported by CLECs to OSS Support managers and/or the Mechanized Customer Production Support Center ("MCPSC") – the new EDR also lists both potentially CLEC-impacting defects identified internally by SBC and defects reported by CLECs to the LSC and/or IS Call Center. See Brown/Cottrell/Lawson Reply Aff. ¶ 17. Thus, the increased number of defects now being reported by SBC Midwest reflects only an increase in the amount and types of defect information being made available to the CLECs. See id. It does not reflect an increase in the actual number of defects, or a decrease in the quality of SBC's releases. See id.

[23] Choice One (at 26-27) and Forte (at 7-9) complain that without the "unreject" functionality, CLECs are required in some instances to fax orders to the LSC, and argue that they should be permitted to send such orders via e-mail. See Brown/Cottrell/Lawson Reply Aff. ¶ 28. As an initial matter, this complaint is undermined by the fact that, with advances in fax technology, CLECs may configure (or may have *already* configured) a fax server so that electronic documents can be sent via fax from any CLEC employee's desktop. See id. ¶ 29. Moreover, the systems and processes utilized by the LSC to manage its manual processing obligations were designed and built to accommodate faxed orders, not e-mail orders. The modification of these systems and processes to accept, consolidate, deliver and track e-mail transactions, in addition to faxed transactions, would require substantial system modifications, training and management of LSC representatives. See id. ¶ 30.

In fact, the overall quality of SBC's releases is improving, as demonstrated by the decline in the number of defects opened after a release. See id. ¶ 18. For example, for the LSOG version 5.0 release for the Midwest region in April 2002, there were 265 defects opened in the first seven days following the release, as compared to 217 and 167 defects associated with the release of versions 5.01 and 5.02, respectively, over the same period. See id. For the June 2003 LSOG version 6.0 release, there were only 169 defects in the first seven days following the release. See id. This improvement demonstrates that SBC's efforts to minimize defects continue to be successful. SBC also addresses any defects that do arise in a timely manner, focusing on those that have been identified as critical to a CLEC's performance. See id. ¶¶ 19-20. For example, since June 16, 2003, a total of 40 defects categorized as "Severity 1" have been identified as critical issues for CLEC production, and as of August 5, 2003, all of those defects were closed or cancelled. See id. ¶ 19. Moreover, through the CMP, SBC continues to provide CLECs with timely notifications and information regarding defects and maintenance releases. See id. ¶ 20.

E. Miscellaneous OSS Issues

Pre-Order Interface Availability. Contrary to AT&T's claims, outages on the CORBA pre-ordering interface have not denied it a meaningful opportunity to compete. See AT&T's DeYoung/Willard Decl. ¶ 51. Indeed, SBC's performance under PM 4 confirms that all three of SBC's pre-ordering interfaces – CORBA, EDI and Verigate – were available almost the entire time they were scheduled to be available. See Brown/Cottrell/Lawson Reply Aff. ¶ 42; see also id. ¶ 50.[24] AT&T does not contest that SBC Midwest meets the relevant benchmarks under PM

[24] Specifically with respect to CORBA, PM 4 results for the months of May through July 2003 reflect that CORBA was unavailable for only approximately 4.81 hours out of a total

4, but argues instead that the Commission should rely on AT&T's own, self-serving data to measure SBC's performance. See id. ¶ 43. Viewed in light of AT&T's vociferous criticisms of SBC Midwest's data in this proceeding (and in Michigan), this contention is stunning. SBC's performance data measured under PM 4 are calculated according to business rules that have been agreed upon after close collaboration with the CLECs, have been approved by the state commissions, and are in the process of being tested by BearingPoint. AT&T's data – what it describes as "impacted user minutes" and "defects per million" – are derived from a methodology that hasn't been explained, using calculations that have not been reviewed, and with raw data that have not been tested. See id. ¶¶ 43-44. Nor is it the case that this Commission should simply take AT&T's data at face value. As the evidence makes clear, for example, AT&T has regularly submitted trouble tickets complaining of degraded service or unavailability of pre-order interfaces, only for SBC to find (based on SBC's investigation) that the problem is on AT&T's side of the interface. See id. ¶¶ 48-49. AT&T's data, in short, are facially unreliable. AT&T's gambit is plainly no substitute for the performance data on which SBC Midwest relies in its application.

Notwithstanding the overall performance reflected in those data, SBC continues constantly to monitor its systems to detect slow-downs and to quickly identify and address any

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scheduled availability of 1,652 hours – for an average availability of 99.7% over the three-month period in the Midwest region – well exceeding the 99.5% benchmark for this measure. In May, there were 0.3 hours of unavailability, or an almost perfect total of 99.95% of the 564 scheduled hours of availability. In June, there were 2.9 hours of unavailability, for an overall result of 99.44% availability – missing the benchmark by 0.06% and, in July, CORBA was available 99.72% of the scheduled hours. See Brown/Cottrell/Lawson Reply Aff. ¶ 42.

potential issues.[25] See id. ¶ 52. As a result, many issues are addressed before they become user-affecting problems, and those that become problems are usually corrected quickly. See id. Moreover, SBC continues to investigate ways to improve the availability and response of its systems, and has made numerous enhancements to its infrastructure and monitoring capabilities. For example, one significant upgrade in progress is a migration of its middleware operating environment to new software which will enhance SBC's failover capabilities and reduce single points of failure, minimizing the effects of any hardware or system software problems in the middleware environment, and further improving the stability of SBC's interfaces. See id. ¶ 53.

IP Addresses. AT&T claims that, by limiting AT&T to three IP addresses, SBC denies AT&T the ability to establish a disaster recovery plan for its operations in the Midwest region. See AT&T's DeYoung/Willard Decl. ¶¶ 27-33. But SBC's connection policies provide CLECs with multiple connectivity options, including three Trading Partner ID and Internet Protocol (IP) address combinations per function (ordering and pre-ordering), per environment (test and production), and per region. See Brown/Cottrell/Lawson Reply Aff. ¶ 108. Moreover, SBC's policy in no way prohibits AT&T from establishing a disaster recovery plan for the Midwest region – as evidenced by the fact that AT&T has established such plans in SBC's West and

[25] PM 4 is designed to measure, and does in fact measure, the impact of interruptions to interface availability on the CLEC community. As set forth in the business rules, if the interface is completely unavailable, 100% of the outage duration is counted against SBC. In the cases where an interface is partially available, an "availability factor" – which is stated as a percentage, and represents the impact of degraded service to the CLEC community as a whole – is applied to the calculation of downtime. SBC's Availability Team determines the availability factor on a case-by-case basis. Under the business rules, any CLEC that disagrees that the PM 4 results capture the impact of outages in a given month is free to raise that issue with the state commission. To the knowledge of SBC's PM staff who would be involved in such a complaint, neither AT&T nor any other CLEC has raised such an issue with a state commission. See Brown/Cottrell/Lawson Reply Aff. ¶ 42.

Southwest Regions under the exact same limitation on IP addresses that applies in the Midwest region. See id. ¶ 109. Given that this same policy applies to all CLECs operating in SBC's 13-state region, SBC's policy limiting CLECs to three IP addresses is not discriminatory in any sense. See id. ¶ 110.

In sum, SBC Midwest's OSS showing stands unrebutted. The third-party tests, the state commission reviews, and the performance data all point in one direction. Against that mass of evidence, CLECs' scattershot allegations fail to call into question SBC Midwest's showing of checklist compliance.

V. ADDITIONAL ISSUES

Several additional issues that commenters have raised do not fit into the broader categories discussed above. None of these issues is meritorious or calls into question the BOC Applicants' compliance with the requirements of section 271.

A. Pricing of Interconnection and UNEs

1. Collocation Power Pricing

AT&T and NuVox allege that Ohio Bell's and Indiana Bell's rates for collocation power are not cost-based. Like most SBC ILECs, Ohio Bell and Indiana Bell charge collocators for power on the basis of the capacity *ordered*, not on the basis of the electrical energy or power actually consumed. Thus, for example, if a CLEC were to order two 20-AMP power leads to its collocation arrangement, Ohio Bell and Indiana Bell would charge the monthly recurring rate for each lead at 20 AMPs per lead (for a total of 40 AMPs), even though the CLEC may ultimately use less than the full amperage it ordered. See Alexander Reply Aff. ¶¶ 8-9 (Reply App., Tab 1). According to AT&T and NuVox, that practice is not cost-based and TELRIC-compliant and therefore runs afoul of the statute and Commission rules. See AT&T Comments at 49-51; NuVox Comments at 2.

As an initial matter, however, the Commission need not address this issue in the context of this section 271 application. Although the PUCO has expressly confirmed the validity and lawfulness of Ohio Bell's charging practices in this regard,[26] these practices are nonetheless the subject of a complaint proceeding now pending before the PUCO, and the same parties that raise this issue here are parties to that proceeding. See Alexander Reply Aff. ¶ 3. Similarly, the IURC is presently entertaining a dispute regarding this same issue. See id. As the Commission has held twice before – in cases that also involved challenges to a 271 applicant's collocation power charges – the pendency of this matter before the state commission makes it unnecessary for the Commission to resolve this issue in this context. See Pennsylvania Order ¶ 108 ("Although we have an independent obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions."); Massachusetts Order ¶¶ 200-203. In those cases, as here, "parties . . . presented no evidence that [the BOC applicant] [wa]s not fully cooperating with the efforts of the [state commission] to resolve these issues." Pennsylvania Order ¶ 108. Accordingly, in those cases, as here, "these disputes do not cause [the applicant] to fail" the checklist. Id.

In any event, Ohio Bell's and Indiana Bell's collocation power charges – and, in particular, their application of those charges to CLECs on the basis of the power capacity the CLECs order – are fully consistent with this Commission's rules. As explained in the Reply

[26] See Report and Evaluation, Investigation Into SBC Ohio's (formerly Ameritech Ohio) Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI, at 44 (June 26, 2003) (App. C-OH, Tab 129).

Affidavit of Scott Alexander, central office equipment runs on "direct current," or "DC," power (as opposed to the "alternating current," or "AC," that powers most households). See Alexander Reply Aff. ¶ 7. To supply DC power, the ILEC must build, maintain, and manage central office DC power plants. And, critically, the scale of that enterprise is driven by the aggregate power demand of the parties that place equipment and facilities requiring such power in the central office in question. So, for example, if AT&T orders two 20-AMP power leads to its collocation cage, Ohio Bell must be able at any given time to deliver the full 40 AMPs of requested power, and it accordingly must have the power plant – including the batteries, rectifiers, generators, and other equipment – in place to deliver that volume. See id. ¶¶ 7-9.

AT&T is thus demonstrably wrong to suggest that Ohio Bell incurs costs to supply power to AT&T only when AT&T actually uses power. See AT&T Comments at 50-51; see generally AT&T's Noorani Decl. As noted above, Ohio Bell must construct, maintain, and manage the overall power plant in order to supply AT&T and other collocated carriers with continuous DC power at the level ordered. See Alexander Reply Aff. ¶¶ 7-10, 21-23. By foreclosing recovery of the costs associated with this plant, AT&T's proposal would leave Ohio Bell in the untenable position of being contractually obligated to supply AT&T's full demand of power at any given time, yet precluded from recovering the costs of doing so. See id. ¶ 10.[27] Indeed, the Commission has specifically rejected the notion that power measurement is the most accurate way to recover DC power plant costs in collocation arrangements. See id. ¶ 26 (citing Second Report and Order, Local Exchange Carriers' Rates, Terms, and Condition for Expanded

[27] NuVox's contention (at 10) that the "Power Delivery" rate captures these costs is simply wrong. "Power Delivery" covers the costs of facilities that *deliver* power. See Alexander Reply Aff. ¶ 21. The costs of the power itself must be recovered elsewhere. See id.

Interconnection Through Physical Collocation for Special Access and Switched Transport, 12 FCC Rcd 18730 (1997)).

AT&T is also wrong – or duplicitous – in claiming that, where a CLEC orders two power leads, one is merely a backup from which the CLEC "generally do[es] not draw power." AT&T Comments at 50. This characterization – which is based on sworn testimony filed with AT&T's Comments, see id. at 50 & n.109 – is directly contrary to testimony (also sworn) that AT&T sponsored in a Texas collocation rate proceeding. There, AT&T's witness testified that collocated equipment with, for example, a "40-amp load" would "typically" be fed "off of two fuses," such that, "if you needed 40 amps of power, you would only require to put 20 amps on each side." See Testimony of Steven Turner on behalf of AT&T, PUC Docket No. 21333, at 347 (Tex. PUC Sept. 27, 2000) (Attach. A to Alexander Reply Aff.); see also Alexander Reply Aff. ¶ 15.[28] AT&T's testimony here simply cannot be reconciled with its testimony there. This inconsistency demonstrates (among other things) the wisdom of this Commission's practice of deferring complex, fact-based issues like the one at issue here to the state commissions that the statute charges with addressing such issues in the first instance. Again, this precise issue is now pending before the PUCO and the IURC, and those bodies are best positioned to draw the appropriate inferences from AT&T's opportunistic change in position.[29]

[28] Indeed, as recently as last month, AT&T expressly confirmed that, in a typical CLEC collocation arrangement, power is typically drawn over both leads. See Alexander Reply Aff. ¶¶ 16-17.

[29] It is also worth noting that the power rates AT&T and NuVox primarily challenge here – Ohio Bell's $6.96 per AMP and Indiana Bell's $6.09 per AMP – are extremely low when compared to rates charged in other states. See Alexander Reply Aff. ¶ 23. Indeed, those rates are barely half the rate charged by Wisconsin Bell ($12.07 per AMP). See id. Moreover, AT&T, MCI, and several other CLECs recently *stipulated* that the Wisconsin rate is within the range that a reasonable application of TELRIC would produce. See id. ¶¶ 3 n.3, 23.

2. Illinois Loop Prices

Alone among commenters, ACN contends that Illinois Bell's UNE rates – and, in particular, its loop rates – violate Checklist Item 2. ACN et al. Comments at 30-34. The basis for this contention is not that the rates now in effect violate TELRIC. Indeed, those rates are among the lowest – if not the absolute lowest – in the country, and CLECs generally have sought to defend them in every imaginable forum. See Wardin Reply Aff. ¶ 45 (Reply App., Tab 13); see also id. ¶ 56 n.43, 57-59. ACN's claim instead is that Illinois Bell's loop rates might increase in the future, if and when the Seventh Circuit reverses a recent district court order that enjoined recently enacted state legislation that, as applied by the ICC, would have increased Illinois Bell's loop rates. As we explain below, the hypothetical nature of this claim renders it irrelevant to the matter at hand.

a. Some background is necessary to understand the nature of ACN's claim. As explained in SBC's opening brief (at 45-46 & n.65), the ICC set the bulk of SBC's UNE rates in its February 1998 ICC TELRIC Order.[30] That order used two cost inputs of significance here. First, it used a fill factor of approximately 80% for all loops. See Wardin Reply Aff. ¶ 46. Second, it adopted depreciation schedules prescribed by this Commission for other regulatory purposes. See id. Largely as a result of those decisions – which served to depress the TELRIC costs set by the ICC well below Illinois Bell's efficient forward-looking costs – the ICC set loop rates that are among the lowest in the country. As the Reply Affidavit of W. Karl Wardin

[30] Second Interim Order, Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic and Illinois Bell Telephone Company, Proposed Rates, Terms and Conditions for Unbundled Network Elements, Docket Nos. 96-0486/0569, Consol. (ICC Feb. 17, 1998) ("ICC TELRIC Order") (App. M, Tab 19).

explains, under the existing rates established by the ICC, CLECs can lease a loop from SBC for under $3 in downtown Chicago, for approximately $7 in the suburbs, and for $11.40 in rural areas. See id. ¶ 45.

Recognizing the investment-dampening effect that such rock-bottom rates were having in the state – and responding to a chorus of appeals from business leaders and labor unions alike – the Illinois General Assembly exercised its longstanding supervisory power over the ICC. See id. ¶¶ 47-49. It did so, however, in a narrow, targeted fashion. Rather than setting rates itself, the General Assembly directed the ICC to continue to perform that function, but to apply cost standards that more accurately reflect the forward-looking costs of an efficient carrier. Specifically, the General Assembly stated that "existing actual total usage" of loop facilities for ILECs operating under price caps "is the most reasonable projection" of forward-looking usage, and it accordingly directed the ICC to "employ current . . . actual total usage on a going forward basis in establishing cost based rates." 220 Ill. Comp. Stat. 5/13-408(a) (2003).[31] With respect to depreciation, the Legislature directed the ICC to use economic lives as reflected in Illinois Bell's books of accounts as reported under Securities and Exchange Commission ("SEC") regulations.

The ICC then initiated a proceeding to revise Illinois Bell's loop rates consistent with the General Assembly's direction. That proceeding involved discovery, filed testimony, and three rounds of comments, and it concluded with the ICC's issuance, on June 9, 2003, of an order

[31] The General Assembly's standard was plainly rational, given that Illinois Bell's *existing* fill levels – which Illinois Bell had developed after more than a decade of operating under price-cap regulation specifically designed to encourage it to engineer its network in an efficient manner – are forward-looking. See Wardin Reply Aff. ¶ 51.

setting revised loop rates. See Wardin Reply Aff. ¶¶ 55-56. The revised loop rates are on average $2 less than SBC had proposed, and they would result in a statewide average UNE-P rate of approximately $19, substantially below the national average of approximately $22. See id. ¶¶ 45, 56.

A federal district court, however, acting at the request of AT&T, MCI, and other CLECs, enjoined implementation of the statute and prevented the ICC's newly prescribed rates from taking effect. See Voices for Choices v. Illinois Bell Tel. Co., No. 03 C 3290, 2003 U.S. Dist. LEXIS 9548 (N.D. Ill. June 9, 2003), appeals pending, Nos. 03-2735 & 03-2766 (7th Cir.). The court's reasoning was two-fold. First, on the theory that the 1996 Act grants "rate-making authority with respect to [UNE] rates" exclusively to "state commissions, not . . . states themselves," the court concluded that the General Assembly's attempt to participate in that function "usurp[ed]" the role of the ICC. Id. at *16-*17. Second, the court concluded that the legislation, by requiring the ICC to use actual fill factors and depreciation as reported to the SEC, "effectively repealed" the FCC's pricing rules, which in its view "clearly bar[] any such emphasis on the incumbent's actual practices." Id. at *13, *20. The district court's order is now on appeal to the Seventh Circuit. See Wardin Reply Aff. ¶ 58.

b. The status quo, then, is that the loop rates in place in Illinois are those set by the ICC in the ICC TELRIC Order. Accordingly, it is those rates on which Illinois Bell relies in this Application. And, contrary to ACN's apparent contention, it is those rates alone that this Commission should review, without regard to the ongoing litigation over the Illinois legislation. That is so for three reasons.

First, Commission precedent supports that result. In several applications, the Commission has reviewed UNE rates that were pending on appeal at the time. See, e.g., New Hampshire/Delaware Order ¶¶ 126-131; Pennsylvania Order ¶ 53 (citing MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania, Inc., No. 97-CV-1857 (M.D. Pa. June 30, 2000), appeal (then) pending, No. 00-2257 (3d Cir.); California Order ¶ 24 n.59 (citing AT&T Communications of California, Inc. v. Pacific Bell Tel. Co., 228 F. Supp. 2d 1086 (N.D. Cal. 2002), appeals (then) pending, Nos. 02-16751, et al. (9th Cir.)). The pendency of those appeals in each of those cases rendered it possible that the rates in place at the time of the Application would be revised at some point in the future, and that, as a result, the CLECs would ultimately be required to pay more than they were in fact paying at the time of the Application. In particular, if the courts had ruled that the challenged rates were unlawful, the state commissions would have been entitled to "undo what [wa]s wrongfully done by virtue of [the prior] order." United Gas Improvement Co. v. Callery Props. Inc., 382 U.S. 223, 229 (1965); see Natural Gas Clearinghouse v. FERC, 965 F.2d 1066, 1073-74 (D.C. Cir. 1992) (per curiam) (the "general principle of agency authority to implement judicial reversals" includes "retroactive rate adjustments when [the agency's] earlier order reversed on appeal improperly disallowed a higher rate"). Yet in none of these cases did the Commission consider the pendency of the appeal as relevant to the question of whether the rates in question satisfied Checklist Item 2. Instead, the Commission simply applied its ordinary analysis and concluded that the rates relied upon in the Application were consistent with the checklist. See, e.g., New Hampshire/Delaware Order ¶¶ 130-131 ("[A]lthough there may be some degree of uncertainty concerning the ultimate outcome of the pending appeal, such uncertainty does not warrant denial of Verizon's New Hampshire section 271 application. Until that appeal is resolved, competitive LECs have the relative certainty of the collocation power rates established by the New Hampshire Commission.").

Those cases are directly on point here. Although the pending litigation in the Seventh Circuit does not involve a direct challenge to the rates at issue in the Application, its potential result – a change in the effective rate of a UNE during the time the Commission considers the Application – is the same. Indeed, here, there is at least arguably *less* uncertainty than was at issue in those cases, for the range of possible results is narrow – either Illinois Bell will lose its appeal (in which case the rates in place today will remain in effect and the CLECs will have no retrospective obligation) or it will win it (in which case the loop rate will be as ordered by the ICC on June 9, 2003, and CLECs will be required to make Illinois Bell whole back to that date). In the cases noted above, by contrast, the range of possible results was at least arguably less confined, creating more uncertainty regarding the CLECs' ultimate obligation. Yet the Commission did not let that uncertainty distract it from the question at issue in those cases: whether the rates on which the BOC applicant relied satisfied Checklist Item 2. The Commission should keep that same focus here.

Second, any other result would impermissibly intrude on the Seventh Circuit's consideration of the appeal from the Voices for Choices district court order. If the Commission were to opine on the lawfulness of the June 9 rates set by the ICC, it would necessarily have to consider whether the underlying standards – in particular, those for fill factors and depreciation rates – are consistent with TELRIC. See, e.g., Massachusetts Order ¶¶ 38-39. The Seventh Circuit, however, is presently considering that very question. As noted above, the district court enjoined the legislation in part because it determined that the use of an actual fill factor and depreciation schedules as reported to the SEC are prohibited by the FCC's rules. One of the critical questions before the Seventh Circuit, then, is whether the ICC may use Illinois Bell's actual fill factor and depreciation as reported to the SEC in setting UNE rates. A Commission evaluation of the June 9 rates set by the ICC would almost certainly cover the same ground.

It is well established that, in such circumstances, the Commission should avoid interference with litigation pending in federal court. As the Supreme Court has explained, where "primary jurisdiction" to resolve a particular question is in the courts, a federal agency should not act to "frustrat[e]" the exercise of that jurisdiction. California v. Federal Power Comm'n, 369 U.S. 482, 490 (1962); cf. Marine Shale Processors, Inc. v. EPA, 81 F.3d 1371, 1377 (5th Cir. 1996) (cautioning against agency action that would necessarily resolve issues pending in a district court action). Commission review of the June 9 rates ordered by the ICC would self-evidently interfere with the Seventh Circuit's resolution of the case before it, and the Commission is accordingly duty-bound to avoid such interference if at all possible.

And such avoidance is clearly possible. As the Commission has explained time and again, "federal courts must be presumed to apply the law correctly," and the Commission therefore has no obligation to inject itself into pending federal court proceedings merely by virtue of its obligation to examine checklist compliance. Texas Order ¶ 237. In this case, that principle means that the Commission should restrict its review to the rates now in effect, and leave it to the Seventh Circuit to determine whether the June 9 rates established by the ICC ever take effect.

Third, notwithstanding the fact that the ICC's June 9 rates are consistent with the 1996 Act and this Commission's rules and precedent, Illinois Bell is willing to reduce any alleged uncertainty associated with the pending litigation in the Seventh Circuit. Specifically, in the event that (a) the Commission approves Illinois Bell's Application and (b) the Seventh Circuit lifts the injunction presently preventing the ICC's June 9 rates from taking effect, Illinois Bell voluntarily commits to true-up its loop rates to a level that is no greater than the loop rates that would pass a "benchmark" comparison to the Texas loop rates that this Commission reviewed and approved in the Texas Order and that are presently in effect in that state, for the period from June 9, 2003, through the date this Commission approves Illinois Bell's Application. This step – which the Commission can and should consider in connection with its review of this checklist item[32] – clarifies that the rates currently before the Commission will not be retroactively replaced by rates that, while consistent with TELRIC, nevertheless have not been reviewed and approved by this Commission in a section 271 proceeding. It accordingly provides the Commission additional reason, if any were necessary, to address only the rates in effect in Illinois today. See, e.g., California Order ¶ 42; Minnesota Order ¶ 49.

In sum, the Commission's intervention at this point is simply not necessary to ensure that the rates the CLECs pay for loops in Illinois comply with the Commission's pricing rules.[33]

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[32] Illinois Bell's commitment is directly responsive "to criticism in the record" regarding the pendency of the Seventh Circuit litigation, and it is made at a time in the proceeding that ensures that all "interested parties have . . . an opportunity to evaluate" and comment upon it to the extent necessary. California Order ¶¶ 29-30. By providing additional certainty regarding Illinois Bell's rates, moreover, this step consititutes "positive action that will foster the development of local competition." Id. ¶ 30. Under well-established precedent, consideration of this commitment is appropriate here. See, e.g., id. ¶¶ 26-31; Rhode Island Order ¶¶ 7-17; New Hampshire/Delaware Order ¶¶ 11-16; Virginia Order ¶¶ 78-85.

[33] In the unlikely event the Commission elects to review the June 9 loop rates established by the ICC, it must conclude that they are consistent with the Commission's rules. In particular, the fill factor utilized in those rates falls comfortably within the range used in rates this Commission has approved previously. See Wardin Reply Aff. ¶ 53. Likewise, the Commission

3. Nonrecurring EEL Charges

Globalcom challenges Illinois Bell's NRCs for one specific type of network element combination: a non-collocated DS1 enhanced extended loop ("EEL"). See Globalcom Comments at 4-17.[34] Specifically, Globalcom asserts that those NRCs are substantially higher than corresponding rates in other states, and that Illinois Bell accordingly fails to satisfy Checklist Item 2. See id. at 6-9.[35]

From the outset, Globalcom's contention faces a steep uphill battle. The NRCs in question were established by the ICC in dockets to which Globalcom was a party. See Wardin Reply Aff. ¶¶ 13-17. Yet Globalcom never once challenged those rates, either on the grounds it presses here or any other. See id. ¶ 15. Moreover, in its section 271 review, the ICC engaged in a searching review of those previously established rates, and Globalcom again declined to object. See id. ¶ 18. This Commission has made clear that, "[w]hen a party raises a challenge related to a pricing issue for the first time in the Commission's section 271 proceedings without showing why it was not possible to raise it before the state commission," the Commission "may exercise [its] discretion to give this challenge little weight." California Order ¶ 19. Globalcom has not

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has specifically held that the use of depreciation schedules "use[d] for financial accounting purposes" is consistent with TELRIC. See Kansas/Oklahoma Order ¶ 76.

[34] Globalcom also challenges the NRCs for this UNE combination in Wisconsin. That challenge is refuted in the Reply Affidavit of Scott T. VanderSanden (Reply App., Tab 12).

[35] Globalcom half-heartedly asserts that Illinois Bell's NRCs for a noncollocated DS1 EEL amount to a violation of the public interest. Globalcom Comments at 17. But Globalcom does not attempt to satisfy this Commission's demanding standards for making such a claim. See, e.g., Vermont Order ¶¶ 68-69. The claim should thus be rejected out-of-hand. See BellSouth Five-State Order ¶ 290 (summarily rejecting MCI's claim that UNE rates violated the public interest where MCI did not attempt to satisfy the standards set out in the Vermont Order).

even attempted to explain why it was not possible to raise its concerns before the ICC, and, in light of its participation in the dockets in which the rates in question were set *and* reviewed, see Wardin Reply Aff. ¶¶ 13-17, it presumably cannot do so. This is accordingly a paradigm instance in which the Commission should exercise its "discretion to give th[e] challenge little weight." California Order ¶ 19; see Vermont Order ¶ 20 ("it is both impracticable and inappropriate for [this Commission] to make many of the fact-specific findings the parties seek in this section 271 review, when many of the [state commission's] fact-specific findings have not been challenged below").

Even if the Commission credits Globalcom's newly raised challenge, moreover, it must under well-established precedent reject it if Illinois Bell "provides a reasonable explanation concerning the issue." California Order ¶ 19. The Reply Affidavit of W. Karl Wardin provides such a "reasonable explanation." Specifically, the NRCs at issue are simply the sum of the charges that apply to the constituent elements of the combination in question. See Wardin Reply Aff. ¶¶ 4, 13-14, 35, 38. The ICC set those rates on the basis of TELRIC principles in proceedings in which all parties had an opportunity to participate, and, since then, no party has ever disputed them. See id. ¶¶ 5-7. Moreover, the ICC reviewed those rates in connection with its section 271 review and it expressly concluded that they were reasonable. Id. ¶ 18; see ICC Final Order ¶¶ 847-848, 887. In view of the ICC's repeated endorsement of the rates in question and the absence of any challenges – by *any* party – to them, Illinois Bell's "explanation" for relying on them in this Application is plainly "reasonable."

Globalcom nevertheless asserts that the NRCs at issue are unlawful because they are higher than rates in other states. See Globalcom Comments at 6-9. But this Commission has consistently recognized that "mere evidence that [a state's rate] . . . is higher than the comparable . . . rate [in another state] does not demonstrate that the [state commission] committed any clear error when it adopted the rate." Vermont Order ¶ 37; see New Jersey Order ¶ 59. And, contrary to Globalcom's assertion (at 6-9), the Commission's "benchmark" analysis is not to the contrary. That analysis is relevant only where a party has identified a potential TELRIC error in the rate that the Commission elects not to resolve, see, e.g., Virginia Order ¶ 89, or where the Bell company does not defend the TELRIC-based nature of the rate in question, see, e.g., Arkansas/Missouri Order ¶¶ 67-68. Neither circumstance is present here. The operative principle here is thus the Commission's steadfast refusal to "apply [the] benchmark analysis to reject UNE rates arrived at through a proceeding that correctly applied TELRIC principles." Vermont Order ¶ 26.

In addition to being legally irrelevant, moreover, Globalcom's contention that Illinois Bell's EEL rates are out-of-line with those in other states is wrong. For one thing, Globalcom's calculation of what CLECs pay in other states is in many respects incorrect. See Wardin Reply Aff. ¶¶ 32-33. More significantly, as the ICC expressly found, when the NRCs at issue are considered in conjunction with the recurring rates that apply to the same UNE combination, Illinois Bell's rates are comparable to rates charged in other states, including states with section 271 approval. See Wardin Reply Aff. ¶¶ 20-22; ICC Final Order ¶¶ 847-848. Indeed, Globalcom emphasizes the EEL rates charged by Pacific Bell in California, and even goes so far as to suggest that the Commission mandate that Illinois Bell adopt those rates in Illinois. See Globalcom Comments at 25-26. But, as the Reply Affidavit of W. Karl Wardin explains, when one considers both recurring and nonrecurring rates over a 24-month period, a CLEC would actually pay *less* for the EEL in question in Illinois than it would in California. See Wardin Reply Aff. ¶ 21.

Globalcom disparages this mode of analysis – and, in particular, the consideration of recurring and nonrecurring rates together – as "specious" and "farcical." Globalcom Comments at 10. But, adjectives aside, it offers nothing to call the analysis into question. Again, Illinois Bell's burden here is, at most, to provide a "reasonable explanation" in defense of the NRCs at issue. At bottom, Globalcom's challenge is based on the factual assertion that Illinois Bell's NRCs for a particular type of EEL prevent Globalcom from competing in the local market in Illinois. In assessing the validity of that challenge, it is self-evidently "reasonable" to consider what Globalcom would actually pay in total for that type of EEL over a relevant period of time.

Commission precedent confirms as much. Although the Commission has never addressed the precise question at issue here, it has made clear in related circumstances that, when considering how specific Bell company rates in an applicant state compare to rates in other states, the relevant question is the aggregate price paid by the CLEC. Specifically, in determining whether Bell company rates satisfy the "benchmark" analysis, the Commission consistently aggregates the rates of "non-loop" elements – i.e., the switch port, end-office switch usage, common transport, and signaling – and compares those rates *as a whole* to the rates charged in the benchmarked state. See, e.g., Virginia Order ¶ 100. That approach, the Commission has reasoned, "reflects the practicalities of how UNEs are purchased and used." Id. ¶ 110. "Because transport and switching UNEs are . . . not purchased separately," it would